

1. Claimant suffered accidental injury on March 18, 1999, while making a delivery of cattle to the IBP plant in Emporia. The injury is a closed-head injury which occurred when a cow kicked a gate that in turn hit claimant in the head.
2. At the time of the accident, claimant was operating a tractor owned by Dennis Sheldon d/b/a Sheldon Trucking with a trailer owned by Branson Truck Line. The tractor was under exclusive lease to Branson Truck Line and claimant was hauling a load contracted for by Branson Truck Line.
3. Several weeks before the accident, Dennis Schuler, owner of Branson Truck Line, approached claimant and asked him to work as a part-time driver filling in for their regular drivers. Claimant agreed, and Branson Truck Line arranged for a physical at claimant's expense.
4. Shortly before the accident, Dennis Sheldon, who drove his own tractor under a lease arrangement with Branson Truck Line, asked Dennis Schuler if claimant could drive his truck while he, Dennis Sheldon, was in Colorado taking care of his father's estate. Schuler agreed. As part of the arrangement, Sheldon agreed to, and did, purchase workers compensation coverage for claimant.
5. Branson Truck Line owns some of the tractors it uses and leases others. When Branson Truck Line leases the tractor, Branson Truck Line pays the tractor owner 75 percent of the money Branson Truck Line receives for the haul. If Branson Truck Line owns the truck, Branson Truck Line pays the driver 25 percent of the load. Branson Truck Line's lease with Sheldon required Branson Truck Line to pay Sheldon 75 percent of the load price. For the load being hauled at the time of the accident, claimant was to be paid a percentage, 22 to 25 percent, of the amount Sheldon received. Branson Truck Line actually paid claimant and withheld taxes. The money Branson Truck Line paid claimant was to be deducted from money Branson Truck Line owed Sheldon.
6. Claimant considered himself to be an employee of Branson Truck Line.
7. Branson Truck Line told claimant where to pick up and where to deliver the load being hauled at the time of the accident.

Conclusions of Law

1. The Board has jurisdiction to review issues listed in K.S.A. 44-534a and there labeled jurisdictional. Among those jurisdictional issues is whether the injury arose out of and in the course of employment. The issue raised by Branson Truck Line in this appeal is whether the injury arose out of employment for Branson Truck Line. The Board, therefore, has jurisdiction to review this question.

2. The Board agrees that, under the circumstances presented in this case, claimant was an employee of Branson Truck Line. The primary test used to determine whether employer-employee relationship exists is the right to control and supervise over work of the alleged employee. *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965). In this case, the only control would have been that exercised by Branson Truck Line through rights granted under the exclusive lease agreement and through its authority as the entity which contracted for the load being delivered. These factors gave Branson Truck Line the right to control sufficient to make claimant its employee. The Board concludes Sheldon was Branson Truck Line's employee while driving, and claimant stepped into Sheldon's shoes, also as Branson Truck Line's employee, when he drove the tractor leased exclusively to Branson Truck Line, with a Branson Truck Line trailer, on a haul contracted for by Branson Truck Line. Other factors which support the Board's conclusion include the fact Branson Truck Line paid claimant and withheld taxes and the fact that claimant was to be employed generally to drive for Branson Truck Line when other drivers were not available. The fact that Sheldon purchased workers compensation insurance by agreement with Branson Truck Line is a relevant factor, but the parties cannot by their agreement dictate the legal conclusion.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Brad E. Avery on August 31, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

c: Stanley Juhnke, Hutchinson, KS
Gary R. Terrill, Overland Park, KS
James B. Biggs, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director